FILED
041040 JAN 28 2005
OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

FRAN JONES,

Petitioner,

v.

ROCKDALE COUNTY, GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT B. JACKSON, IV
Counsel of Record
DONALD D.J. STACK
STACK & ASSOCIATES, P.C.
260 Peachtree Street, NW
Suite 1200
Atlanta, Georgia 30303
(404) 525-9205

Attorneys for Petitioner

192398

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Rockdale County, Georgia entered into contracts with the State of Georgia Department of Transportation ("GA DOT") and others to widen a stretch of state route 20 that passes near Ms. Jones' residence and her once pristine private lake. During road construction, Rockdale County intentionally directed the polluted stormwater runoff from the road and the developing right-of-way into Ms. Jones' lake without her consent, without any Clean Water Act 33 U.S.C. §§ 1251 *et seq.* ("CWA") permits, and without a Resource Conservation Recovery Act 42 U.S.C. §§ 6901 *et seq.* ("RCRA") disposal permit. To this day, no permits have been obtained, many tons of the dumped materials remain in Ms. Jones' lake, and the polluted stormwater runoff from the widened road continues to be intentionally and illegally dumped into Ms. Jones' lake with every storm.

Four questions of great national importance are presented:

1. Whether only persons having authority to make "final decisions" about CWA and RCRA compliance have liability for CWA and RCRA violations.

2. When is a discharge "subject to" a CWA § 402 permit, and thereby excluded from the RCRA 42 U.S.C. § 6903(27) solid waste definition.

3. Whether RCRA's application and integration provisions at 42 U.S.C. § 6905 bar simultaneous citizen suits under RCRA and the CWA.

4. Whether the "Surprise" Alleged to Support an Exclusion of Evidence Under FRCP 37(c)(1) Must be Genuine and Justified.

LIST OF PARTIES

In addition to plaintiff Ms. Fran Jones, the other parties to the proceedings in the United States District Court for the Northern District of Georgia – Atlanta Division were the following defendants: Reynolds, Inc.; E.R. Snell Contractor, Inc.; State of Georgia Department of Transportation; J. Tom Coleman, Jr., in his Official Capacity as Commissioner of the Georgia Department of Transportation; and Rockdale County, Georgia. All of the Defendants except Rockdale County, Georgia have settled with Ms. Jones and been dismissed from the case.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	8
Reasons for Granting the Petition	10
I. The Lower Courts' Opinions are Directly Contrary to the Plain Language of RCRA, the CWA, and Binding U.S. Supreme Court Precedent.	10
II. The Conflicting Federal Court Decisions Interpreting RCRA's Solid Waste Exclusion Perpetuate Great Uncertainty About What the Law Is.	13

Contents

	Page
III. The District Court and the Court of Appeals Have Failed or Refused to Interpret and Apply RCRA According to Its Plain Language. . . .	17
IV. A Defendant's Claimed "Surprise" Which Would Support Exclusion of Plaintiff's Evidence Under FRCP 37(c)(1) Must Be Genuine, Not a Fabrication, and Not the Result of Defendant's Willful Ignorance. . .	20
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

Cases:

Buchholz v. Dayton International Airport, 1995 WL 811897 (S.D. Ohio 1995) 15

Carbone v. Town of Clarkston, 511 U.S. 383, 114 S. Ct. 1677 (1994) 10

Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc., 989 F.2d 1305 (2d Cir. 1993) ... 19

Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 96 S. Ct. 2022 (1976) 13

Fishel v. Westinghouse, 617 F. Supp. 1531 (D.C. Pa. 1985) 16

Inland Steel Co. v. U.S.E.P.A., 901 F.2d 1419 (7th Cir. 1990) 16

Lutz v. Chromatex, Inc., 725 F. Supp. 258 (M.D. Pa. 1989) 15

Meghrig v. KFC Western, Inc., 516 U.S. 479, 116 S. Ct. 1251 (1996) 12

Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474 (1974) 17

Radzanower v. Touche Rose & Co., 426 U.S. 148, 96 S. Ct. 1989 (1976) 17

Cited Authorities

	Page
South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95, 124 S. Ct. 1537 (2004)	10, 11, 13
State v. PVS Chemicals, Inc., 50 F. Supp.2d 171 (W.D. NY 1998)	15-16
U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 112 S. Ct. 1627 (1992)	10, 11
United States v. Allegan Metal Finishing Co., 696 F. Supp. 275 (W.D. Mich. 1988)	15
United States v. Dean, 969 F.2d 187 (6th Cir. 1992)	16
United States v. Vineland Chemical Company, Inc., 692 F. Supp. 415 (D.N.J. 1988)	19
Water Keeper Alliance v. U.S. Department of Defense, 152 F. Supp.2d 163 (D. PR 2001)	15
Williams Pipeline Company v. Bayer Corporation, 964 F. Supp. 1300 (S.D. Iowa 1997)	16
Statutes:	
28 U.S.C. § 1254(1)	1
33 U.S.C. §§ 1251 *et seq.*	9
33 U.S.C. § 1311(a)	5

Cited Authorities

	Page
33 U.S.C. § 1342	5, 10
42 U.S.C. §§ 6901 *et seq.*	i, 9
42 U.S.C. § 6903(3)	1
42 U.S.C. § 6903(27)	*passim*
42 U.S.C. § 6905	i, 10, 17
42 U.S.C. § 6905(a)	2, 18
42 U.S.C. § 6905(b)	19
42 U.S.C. § 6905(b)(1)	3, 18, 19
42 U.S.C. § 6945(a)	3, 12
42 U.S.C. § 6972(a)(1)(A)	4, 12
42 U.S.C. § 6972(a)(1)(B)	4, 12

Cited Authorities

Page

Rules:

FRCP 26 .....6, 21, 22, 23

FRCP 37(c)(1) ..... *passim*

Regulations:

40 C.F.R. § 261.4(a)(2) 16

40 C.F.R. § 122.26 14

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed September 8, 2004 ..... 1a

Appendix B — Order Of The United States District Court For The Northern District Of Georgia Atlanta Division Filed January 30, 2004 ..... 9a

Appendix C — Judgment Of The United States District Court For The Northern District Of Georgia, Atlanta Division Dated And Filed February 3, 2004 ..... 23a

Appendix D — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated November 2, 2004 ..... 25a

Appendix E — Agreement Dated September 27, 1994 27

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court for the Northern District of Georgia – Atlanta Division are unreported and are set forth in the Appendix to this Petition for Writ of Certiorari at Appendix A and B respectively.

STATEMENT OF JURISDICTION

On September 8, 2004, the U.S. Court of Appeals affirmed the Order of the U.S. District Court holding that simultaneous suits under RCRA and the CWA are prohibited, and that certain waste discharges are excluded from RCRA's solid waste definition by a CWA permit that was never sought or obtained, and that only persons with ultimate authority have liability for RCRA and CWA violations.

On November 2, 2004, the Court of Appeals denied Ms. Jones' timely Petition for Rehearing and Petition for Rehearing *en banc*. (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

– Federal Resource Conservation and Recovery Act –

42 U.S.C.A. § 6903(3)

> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or

hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C.A. § 6903(27)

The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. § 2011 et seq.].

42 U.S.C. § 6905(a)

Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.], the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.], the Marine Protection, Research and Sanctuaries Act of 1972 [16 U.S.C.A. §§ 1431 et seq., 1447 et seq., 33 U.S.C.A. §§ 1401 et seq., 2801 et seq.],

or the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.] except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.

42 U.S.C. § 6905(b)(1)

The Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act [42 U.S.C.A. § 7401 et seq.], the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.], the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.], the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.], the Marine Protection, Research and Sanctuaries Act of 1972 [16 U.S.C.A. §§ 1431 et seq., 1447 et seq., 33 U.S.C.A. §§ 1401 et seq., 2801 et seq.], and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection.

42 U.S.C. § 6945(a)

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste

> or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping.

42 U.S.C. § 6972(a)(1)(A)

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf – against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter;

42 U.S.C. § 6972(a)(1)(B)

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf – [. . .] against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present

generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;

– Federal Clean Water Act –

33 U.S.C. § 1342(a)(1)

National pollutant discharge elimination system. Permits for discharge of pollutants. Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1311(a)

Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 1312, 1316, 1317,

1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

– Federal Rules of Civil Procedure –

FRCP 26(a)(1)(B)

Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties: . . . a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

FRCP 26(a)(2)(B)

Disclosure of Expert Testimony. Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support

for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

FRCP 26(e)

Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances: (1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due. (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request

> for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

FRCP 37(c)(1)

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

STATEMENT OF THE CASE

Rockdale County, Georgia entered into contracts with the State of Georgia Department of Transportation ("GA DOT") and others to widen a stretch of state route 20 that passes near Ms. Jones' residence and her once pristine private lake. Rockdale County's responsibilities on the project included clearing the proposed new right-of-way of

underground storage tanks and other obstructions, developing and managing project design and implementation, certifying that "all needed rights of way" had been obtained, and obtaining "all needed permits" for the project. Construction on the stretch of road in the watershed that drains to Ms. Jones lake began sometime after February of 1996. During construction on that stretch of road, Rockdale County intentionally directed the polluted stormwater runoff from the road and the developing right-of-way into Ms. Jones' lake without her consent, without any Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA") permits, and without a Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 *et seq.* ("RCRA") disposal permit. Road construction ended on or about October of 2001. To this day, no permits have been obtained, much of the dumped material remains in Ms. Jones' lake, and the polluted stormwater runoff from the widened road continues to be intentionally and illegally dumped into Ms. Jones' lake with every storm. The polluted stormwater carries and deposits trash, chemicals, eroded soils, detritus – and during the construction – tons and tons of sand, silt and clay exposed by the construction land disturbance, into Ms. Jones' lake.

The increased volume and flows of polluted stormwater are an eyesore, flood and devalue Ms. Jones' property, kill her fish and other aquatic life, scour and erode her lake inlet and shore, and threaten her lake's earthen dam with overtopping and collapse. Ms. Jones brought suit seeking *inter alia*, an injunction against Rockdale County and others for violation of the permit requirements of the CWA and RCRA, and for violation of RCRA's open dumping and imminent and substantial endangerment prohibitions. The Eleventh Circuit Court of Appeals affirmed the District Court's conclusion that unless Rockdale County had authority to make so-called "ultimate" or "final decisions" about how

the stormwater runoff was directed, it could have no liability under RCRA or the CWA. The Eleventh Circuit affirmed the District Court's conclusion that the waste disposed of into Ms. Jones' lake is excluded from the definition of a 42 U.S.C. § 6903(27) RCRA solid waste because it is "subject to" a CWA under 33 U.S.C. § 1342 (i.e., a CWA § 402 permit). The 11th Circuit affirmed the District Court's conclusion that RCRA's application and integration provisions at 42 U.S.C. § 6905 prohibit Ms. Jones from simultaneously bringing her claims under RCRA and the CWA. Rockdale County claimed surprise when Ms. Jones argued at summary judgment that its CWA liability might, in part, be based on its ownership and control of the point source (i.e. the culvert pipe) that discharges the polluted stormwater. In response, the District Court excluded the ownership evidence pursuant to FRCP 37(c)(1), and the Eleventh Circuit affirmed.

REASONS FOR GRANTING THE PETITION

I. The Lower Courts' Opinions are Directly Contrary to the Plain Language of RCRA, the CWA, and Binding U.S. Supreme Court Precedent.

The Clean Water Act (CWA) regulates the discharge of pollutants into navigable waters of the United States. *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627 (1992). *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537 (2004). The Resource Conservation and Recovery Act (RCRA) is a "sweeping statute intended to regulate solid waste from cradle to grave." *Carbone v. Town of Clarkston*, 511 U.S. 383, 114 S. Ct. 1677 (1994). Under RCRA, solid waste is defined to include liquids. 42 U.S.C. § 6903(27).

The CWA and RCRA prohibit the discharge of pollutants and disposal of solid waste, respectively, without the proper permits. *Id.*; *Ohio*; *Miccosukee*. In this case, it is undisputed that Ms. Jones' lake was used for pollutant discharges and waste disposals during construction and is still being used for pollutant discharges and waste disposals from the widened road. Rockdale County's position is that it has no liability for the disposals and discharges. Ms. Jones has consistently identified three independent factual bases for Rockdale County's CWA and RCRA liability.

First, in its contract with GA DOT, Rockdale County specifically accepted responsibility for obtaining *all* the permits needed for their road widening project. *See*, Appendix E. It is undisputed that no CWA or RCRA permits were applied for or obtained. Second, Rockdale County actually performed and was responsible for drainage design, and controlled portions of the land disturbance and other work that occurred in the watershed upgradient of Ms. Jones' lake. It is undisputed that Rockdale County's project design and implementation intended to put the discharges and disposals into Ms. Jones' lake. Third, Rockdale County owns and gave express approval for use of its Lennox Road right of way, including specifically its outfall culvert pipe, to convey the polluted stormwater runoff from the widened road into Ms. Jones' lake.[1]

The Court of Appeals and District Court opinions in this case hold that Rockdale County has no obligation to comply with the CWA or RCRA so long as GA DOT had final or ultimate authority to direct the stormwater into Ms. Jones lake. That is not the law.

---

1. The District Court excluded evidence of Rockdale County's ownership of the point source (i.e. the culvert pipe). That issue is taken up *infra* at IV.

Under RCRA's "imminent and substantial endangerment" (ISE) citizen suit section at 42 U.S.C. § 6972(a)(1)(B), any person may bring suit against any person "who *has contributed or who is contributing* to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment (emphasis added). *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S. Ct. 1251 (1996). This Court should grant the Writ of Certiorari because the lower Courts' opinions that only those persons having final or ultimate authority are liable for violating RCRA's ISE prohibition is plainly contrary to the express statutory language and purpose of RCRA. Ms. Jones is entitled to demonstrate that Rockdale County caused or contributed to an ISE, irrespective of whether Rockdale County had final or ultimate authority.

Under RCRA's "violations" citizen suit section at 42 U.S.C. § 6972(a)(1)(A) – which section also allows RCRA's 42 U.S.C. § 6945(a) open dumping prohibition to be enforced by citizen suit – any person may bring suit against "*any person . . . who is alleged to be in violation* of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to" RCRA. 42 U.S.C. § 6972(a)(1)(A). This Court should grant the Writ of Certiorari because the lower Courts' opinions that only those persons having final or ultimate authority are liable for violations of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to RCRA, is plainly contrary to the express statutory language and purpose of RCRA. Ms. Jones is entitled to demonstrate that Rockdale County violated RCRA – by for example, failing or refusing to satisfy the compliance obligation it assumed to obtain the

necessary permits – irrespective of whether Rockdale County had final or ultimate authority.

Under the CWA, "all dischargers of water pollution" may be sued to enforce permit conditions. . . ." *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 96 S. Ct. 2022 (1976); *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537 (2004) (persons whose conduct is a "cause-in-fact of the discharge of pollutants" in violation of the CWA have liability). Rockdale County's failure or refusal to obtain any permits, or otherwise obtain compliance with the CWA, makes Rockdale County a discharger on this project. This Court should grant the Writ of Certiorari because the lower Courts' opinions that only those persons having final or ultimate authority are CWA dischargers is plainly contrary to the binding CWA precedent of this Court.

II. The Conflicting Federal Court Decisions Interpreting RCRA's Solid Waste Exclusion Perpetuate Great Uncertainty About What the Law Is.

RCRA defines solid waste at 42 U.S.C. § 6903(27). Material that is discarded and not expressly excluded by 42 U.S.C. § 6903(27) is a RCRA solid waste. RCRA's solid waste definition expressly includes liquids but expressly excludes "*industrial discharges which are point sources subject to permits under section 1342 of title 33. . . .*" (emphasis supplied). 42 U.S.C. § 6903(27). In this case, the District Court and the Court of Appeals held that all the materials dumped into Ms. Jones' lake are excluded from RCRA's solid waste definition.

An analysis of the "subject to" possibilities helps clarify the issue. As an initial matter, the material being considered as RCRA solid waste must be both an *industrial discharge* and a *point source* for the 42 U.S.C. § 6903(27) exclusion to even arguably apply in the first place. During construction for the road widening in this case, the materials in Ms. Jones' lake that were stormwater and pollutants collected and sent through the Lennox Drive culvert, were an industrial discharge from a point source (significantly, that material is not all of the waste for which Rockdale County was responsible). However, when the "construction activity" on the Project ended, the industrial nature of the discharge ended. *See*, 40 C.F.R. § 122.26. As a result, all of the stormwater and other waste sent to Ms. Jones' lake since the end of construction, and all of the stormwater and waste sent to Ms. Jones' lake that did not discharge from the point source obviously are not excluded from RCRA's solid waste definition. Also, during construction, all the stormwater and other waste that was not discharged through the point source but, for example, eroded from or was otherwise carried off of the Church property and transported to the lake is also not excluded.

However, for those portions of the materials that constitute "industrial discharges which are point sources" the question remains whether those materials are "subject to" a CWA § 402 permit. The District Court and Court of Appeals held that the materials are excluded from RCRA regulation even though no CWA § 402 permit was sought or obtained and even though any other compliance with the CWA is disputed. This interpretation is error and is against the weight of case authority on the issue.

In *Water Keeper Alliance v. U.S. Department of Defense*, 152 F. Supp.2d 163, 169-70 (D. PR 2001), the court held that discharges occurring before the defendant obtained its CWA § 402 permit, or which – even after defendant obtained its permit – occurred to soil and groundwater rather than to navigable waters of the U.S., were not "subject to" that permit within the meaning of 42 U.S.C. § 6903(27). Likewise, in *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 281 (W.D. Mich. 1988), the Court found:

> . . . no merit in defendant's argument that a NPDES permit – which did not authorize discharges into the Kalamazoo River until October 1987 – somehow precludes RCRA regulation with respect to the disposal of hazardous waste to its onsite ponds that occurred continuously from 1980 until October 1987.

Id. The majority of Courts addressing the 42 U.S.C. § 6903(27) "subject to" issue have reached a similar result. *See e.g., Lutz v. Chromatex, Inc.*, 725 F. Supp. 258 (M.D. Pa. 1989) (RCRA solid waste exclusion only for those actual discharges from point sources which are made pursuant to and authorized by a NPDES permit); *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275 (W.D. Mich. 1988) (industrial wastewater discharged into holding ponds not excluded from RCRA waste definition); *Buchholz v. Dayton International Airport*, 1995 WL 811897, *23-24 (S.D. Ohio 1995) ("Dayton's discharges from the spillway are not authorized by Dayton's NPDES permit; thus, these discharges to the Mill Creek constitute disposal of 'solid waste' under RCRA" and subject defendants to RCRA liability if they *may* present an imminent and substantial endangerment to health or the environment); *cf. State v. PVS Chemicals, Inc.*,

50 F. Supp.2d 171, 178-9 (W.D. NY 1998) (discharges to groundwater are not excluded from solid waste definition, while point source discharges subject to CWA permit are excluded whether or not they are within effluent levels set in the permit); *Williams Pipeline Company v. Bayer Corporation*, 964 F. Supp. 1300, 1328-29 (S.D. Iowa 1997); *Fishel v. Westinghouse*, 617 F. Supp. 1531, 1538 (D.C. Pa. 1985).

In *United States v. Dean*, 969 F.2d 187, 194 (6th Cir. 1992), the Sixth Circuit held that waste was not excluded because the exclusion applied only to the point source discharge itself, "not the contents of the pond or discharges into it." *Id.* The Court in *Dean* based its reasoning on a comment to an EPA regulation defining the jurisdiction between RCRA and the CWA. The regulation clarified that RCRA's solid waste exclusion:

> . . . [a]pplies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored, or treated before discharge . . .

Id.; 40 C.F.R. § 261.4(a)(2). The Seventh Circuit reached the same result in a different case, noting that the RCRA exclusion is limited to certain discharges (i.e. covers only a subset of point sources regulated under the CWA), that not all disposals are discharges, and that "[t]he Clean Water Act is designed for the protection of navigable waters." *Inland Steel Co. v. U.S.E.P.A.*, 901 F.2d 1419, 1422-23 (7th Cir. 1990).

In this case, the waste about which Ms. Jones' complains arrived at her property as runoff from an adjacent church property and/or through the Lennox Drive point source

culvert for which Rockdale County never sought or obtained any CWA § 402 permit. Therefore, all the waste constitutes solid waste within the meaning of 42 U.S.C. § 6903(27). Alternatively, only those wastes that did not pass through the Lennox Drive culvert, are solid waste within the meaning of 42 U.S.C. § 6903(27). In either event, a significant amount of solid waste as defined by RCRA, was not "subject to" a CWA permit under § 402, and was disposed of at Ms. Jones' property in violation of RCRA and the CWA. In light of the conflicting federal court decisions, this Court should grant the Writ of Certiorari to clarify the circumstances where a discharge is "subject to" a CWA § 402 permit within the meaning of RCRA 42 U.S.C. § 6903(27).

III. The District Court and the Court of Appeals Have Failed or Refused to Interpret and Apply RCRA According to Its Plain Language.

The Court of Appeals and the District Court were required to give full effect to RCRA unless its provisions are in irreconcilable conflict with the CWA. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 2483 (1974); *Radzanower v. Touche Rose & Co.*, 426 U.S. 148, 155, 96 S. Ct. 1989, 1993 (1976) (where two statutes are capable of co-existence, it is the duty of the courts to regard each as effective). Instead, the District Court and Court of Appeals hold that RCRA's application and integration provisions at 42 U.S.C. § 6905 bar Ms. Jones' simultaneous citizen suits under RCRA and the CWA. The District Court and Court of Appeals are clearly wrong. RCRA's application provision at 42 U.S.C. § 6905(a) requires in pertinent part:

> [n]othing in this chapter shall be construed to apply to (or to authorize any State, interstate, or

> local authority to regulate) any activity or substance which is **subject to** the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.] . . . except to the extent that such application (or regulation) is **not inconsistent** with the requirements of such Acts. (Emphasis supplied).

It is patently obvious from the statutory text that Congress intended for RCRA to apply to some activities or substances "subject to" the CWA. Otherwise, 42 U.S.C. § 6905(a) could have simply excluded application of RCRA altogether from any activity or substance "subject to" the CWA. Instead, 42 U.S.C. § 6905(a) excepts RCRA application only "to the extent that such application (or regulation) is not inconsistent with the requirements" of the CWA. The Court of Appeals and District Court both ignored the plain language of the statute and failed to give full effect to RCRA, as neither demonstrates how RCRA and the CWA are inconsistent in this case. They simply held summarily that Ms. Jones' RCRA claims are barred by 6905(a). This Court should grant the Writ of Certiorari to clarify and require the lower courts to interpret and apply the statute as it is written.

RCRA's integration provision at 42 U.S.C. § 6905(b)(1) requires in pertinent part:

> [t]he **Administrator shall** integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the ... the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], . . . and such other Acts of Congress as grant regulatory authority to the Administrator. Such **integration**

> **shall be** effected only to the extent that it can be done in a manner **consistent** with the goals and policies expressed in this chapter and in the other acts referred to in this subsection. (Emphasis supplied).

This "anti-duplication" section on its face operates only on the U.S. EPA Administrator. It cautions the Administrator against promulgating RCRA regulations that are "inconsistent with the requirements" of the CWA. Thus, 42 U.S.C. § 6905(b) is nothing more than a general admonition to the U.S. EPA Administrator against wasteful regulation. *United States v. Vineland Chemical Company, Inc.*, 692 F. Supp. 415, 420-21 (D.N.J. 1988) (Section 6905(b) creates no rights in defendants to resist regulation; rather, it constitutes an exhortation to the U.S. EPA to avoid unnecessary and overlapping regulation). Because RCRA's Section 6905(b) anti-duplication provision is a mere admonishment to the U.S. EPA to avoid unnecessary and overlapping regulation, it is not a right enforceable by the regulated community that wish to avoid application of RCRA to their waste disposal activities. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1317 (2d Cir. 1993).

The Court of Appeals and the District Court ignored the plain language of RCRA and failed to give full effect to the statute. Neither court states how RCRA's congressional admonishments to the U.S. EPA in 6905(b)(1), preclude Ms. Jones from bringing her claims simultaneously under RCRA and the CWA. This Court should therefore grant the Writ of Certiorari to reverse the lower courts' erroneous determination that statutory directives to the United States EPA Administrator regarding regulation promulgation, somehow preclude consistent simultaneous citizen suits under RCRA and the CWA.

IV. A Defendant's Claimed "Surprise" Which Would Support Exclusion of Plaintiff's Evidence Under FRCP 37(c)(1) Must Be Genuine, Not a Fabrication, and Not the Result of Defendant's Willful Ignorance.

In her summary judgment briefing, Ms. Jones argued that Rockdale County's CWA liability is in part based upon its ownership of an outfall pipe culvert at Lennox Road (i.e., the point source). In response, Rockdale County succeeded in having the evidence of its ownership of the culvert excluded under FRCP 37(c)(1) by claiming that it understood Ms. Jones' case against it was based solely on its role in obtaining a project design that used Ms. Jones' lake (so-called "design flaw") to dispose of the stormwater. If, as it claimed, Rockdale County understood the case against it to consist solely of what it calls a design flaw, then it simply fabricated that allegation and/or had its proverbial head in the sand. From the outset, Ms. Jones had always claimed in writing that Rockdale County had CWA liability as an "owner and/or operator." The only point source that has ever been discussed in detail in this case is Rockdale County's outfall pipe culvert at Lennox Road that discharges onto the Church property.

Rockdale County disclosed its ownership of the Lenox Drive right-of-way (that includes the culvert) to Ms. Jones in its pre-litigation correspondence with Ms. Jones. In her written discovery responses to the County, Ms. Jones specifically informed the County she intended to rely on *all* of their correspondence to prove Rockdale County's CWA liability. In the CWA portion of her brief in support of partial summary judgment, Ms. Jones argued ". . . the storm drains, culverts, storm sewers and other pipes handling stormwater from the Project here are point sources under the CWA."

The fact that Rockdale County owned the only point source discharging onto the church property that had *ever* been at issue in the case, could not have come as a surprise to Rockdale County. The fact that Ms. Jones was alleging "owner and/or operator" liability against Rockdale County, for whatever it owned or operated that caused or contributed to the violations, could not possibly have surprised Rockdale.

Ms. Jones had specifically stated in her Complaint that Rockdale is an "Owner and/or Operator." Ms. Jones' had previously served expert reports to Rockdale County that included the alleged new information, as required by FRCP 26(a)(2)(B). The report of Ms. Jones' expert biologist (Mark Larue) for example discusses the Lennox Road right of way and outfall culvert specifically and at length. Mr. Larue's report contains photographs of the Lenox Drive outfall culvert and contains the results of numerous analytical samples taken at the Lenox Drive outfall culvert (identified interchangeably as "Discharge of Culvert" and as "storm outlet"). Rockdale deposed Mr. Larue at length specifically about the Lennox Drive stormwater collection and discharge structures. At one point during their deposition questioning, Rockdale just told Mr. Larue:

p48

1 Q. When I ask you these questions, I am talking

2 about Lenox Road. I am assuming you didn't do any

3 research outside of that along Lenox Road, did you?

> 4 A. My scope was limited to that stretch of
> 20 that
>
> 5 drains along Lenox Road.

Thus, any failure by Ms. Jones to again supplement or amend with the fact that she was basing her claim on Rockdale's ownership of the Lenox Drive culvert outfall was harmless within the meaning of FRCP 37(c)(1), because that is the only point source discharging onto the church property that the parties had been fighting over for almost five years before the lawsuit was filed. In fact, virtually every piece of written correspondence between Rockdale County and Ms. Jones discussed the discharge from that culvert. Ms. Jones was not required to supplement or amend her prior responses. *See*, FRCP 26(e); FRCP 26(a)(2)(B).

There was never – as a matter of law and common sense – any justification for Rockdale County to "understand" that the owner/operator allegations in Ms. Jones' complaint were not being made against it. There was no justification for Rockdale County to disregard Ms. Jones' owner/operator allegations as "boilerplate" (as it refers to them) – e.g. not to be taken seriously. Ms. Jones' Complaint *specifically* plead that "Defendant County ... is an owner and/or operator" ... "of the source. ..." There was no justification for Rockdale County to not take seriously Ms. Jones' interrogatory response that she was relying on all of Rockdale County's correspondence with her to prove her case against Rockdale County. As a result, any failure to supplement discovery by Ms. Jones in this case was upon "substantial justification" within the meaning of Rule 37(c)(1) because Ms. Jones reasonably and correctly believed her discovery responses were complete, and she actually knew that the information

Rockdale County claims is a surprise had already been made known to Rockdale County in discovery, in other writings, and during depositions. Thus, the District Court abused its discretion by excluding the evidence. FRCP 37(c)(1) permits the Court to impose "appropriate sanctions" other than evidence exclusion. Ms. Jones was not required to supplement or amend her prior responses. *See* FRCP 26(e); FRCP 26(a)(2)(B).

The Federal Rules of Civil Procedure are concerned with prevention of surprise to be sure, but the surprise must be genuine and justified. Where as here, the complaining party cannot legitimately claim surprise because FRCP 26(e) was satisfied by its correspondence in writing for years with the Plaintiff regarding the facts and claims alleged to be a surprise, and had served and received discovery thereon, and was on notice of Plaintiff's facts and claims via the Complaint, and the Initial Disclosures pursuant to FRCP 26(a)(1)(B), and the expert disclosures pursuant to FRCP 26(a)(2)(B), it must certainly be an abuse of discretion for the harsh sanction imposed by the district court to be allowed to stand in the face of such an obviously fabricated allegation of surprise. This Court should grant the Writ of Certiorari to establish that the "surprise" which will support exclusion of evidence under FRCP 37(c)(1) must be genuine, not a fabrication, and not the result of willful ignorance.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT B. JACKSON, IV
Counsel of Record
DONALD D.J. STACK
STACK & ASSOCIATES, P.C.
260 Peachtree Street, NW
Suite 1200
Atlanta, Georgia 30303
(404) 525-9205

Attorneys for Petitioner